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Human Rights and the role of courts in Thailand

Introduction

Inarguably, all “legal states” governed under the rule of law must adhere to the basic principles of democracy. More important is the need to incorporate in their Constitution provisions that offer the appropriate level of protection and guarantee the fundamental rights vested in the people. As for Thailand, which is my home country, such provisions can be found in the Constitution of the Kingdom of Thailand B.E. 2550 (2007). For instance, Article 4 offers the basic protection of human dignity, rights, liberty and equality whereas Article 26 ensures that people are not deprived of their Constitutional rights in the course of enforcing the law. In this respect, Article 28 clearly states that a person can invoke exercise his/her rights insofar as it does not deprive other people of their respective rights or is not contrary to the Constitution or the good moral of the people of Thailand. For example, a person can invoke his/her judicial rights to directly compel the State to comply with these aforementioned provisions. Any law allowing the exercising of these rights that is recognized by the Constitution shall be applied and not be derogated from in all circumstances without any exception¹.

As regards to human rights, Thailand strictly follows the 1948 Universal Declaration of Human Rights (UDHR) introduced to the world by the United Nations, a supra-national organization of which Thailand became a loyal member 65 years ago. To date, Thailand has become a signatory in 7 conventions, which are as follows²:

- Convention on the Rights of the Child (CRC),
- Convention on the Elimination of All forms of Discrimination against Women (CEDAW),
- International Covenant on Civil and Political Rights (ICCPR),

1 B. Meewongaukot, *Kod-Mai-Rat-Tha-Tham-Ma-Noon*, Bangkok 2010, p. 416.

2 M. Haas, *International human rights: A comprehensive introduction*, New York 2008, p. 151.

- International Covenant on Economic, Social and Cultural Rights (ICESCR),
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),
- Convention on the Rights of Persons with Disabilities (CRPD).

As a dualist country, Thailand must first enact its national laws domestically. In this light, the binding obligations undertaken under each Convention will be incorporated into a national law, in other words acquiescing to the international commitment. In addition to this, various government bodies are established in order to ensure that these commitments are duly delivered³. The aforesaid authorities will act independently and separately from one another to monitor and oversee the acts of the State.

The issue of human rights is not limited only in Thailand but also a major problem in the world as it becomes more serious day by day; whether problems of human dignity, problems of racial discrimination, problems of liberties to assembly and association or the rights of women and children, etc. The grounds of problems to protect human rights in Thailand are the following:

The lack of knowledge about human rights. The State agency or State official including the people did not know his or her fundamental rights and duties. That's why we are always making a mistake about the interpretation of the term "human rights" just only in legal terms, as a result human rights violations are ongoing and increasingly more common in Thailand. They have to realize that human rights are inherent natural rights; as a fundamental right of every human being without regard to race, nationality, religion, health or disability. Which does not depend on the extent of the law, but it looks beyond the law⁴.

Law enforcement is ineffective. Although, Thailand has obligations according to The Universal Declaration of Human Rights by the United Nations Organization but law enforcement is ineffective to enforce or sanction with the person or organization that breaks the law. It might be that the access into the rights of people is more difficult or the lack of expertise personnel to take responsibility for protecting the rights and freedoms of citizens. The protection of human rights must have a balance between public interests and protection of the rights and freedom of citizens. They have to start protecting human rights and strongly control and inspect the States power for ensuring human rights in Thailand.

The problem of the cultural beliefs of Thai people. The Buddhist interpretation of karma does not refer to preordained fate. Karma refers to the good or bad actions a person takes during his/her lifetime. Good actions, which involve either the absence of bad ac-

3 A. Clapham, *Human rights: A very short introduction*, Oxford 2007, p. 134.

4 J. Ife, *Human rights and Social work : towards rights-based practice*, New York 2008, p. 12.

tions or actual positive acts such as generosity, righteousness, and meditation bring happiness in the long run. Bad actions such as lying, stealing or killing bring unhappiness in the long run. The weight that actions carry is determined by five conditions: frequent or repetitive action; determined or intentional action; action performed without regret; action against extraordinary persons and action toward those who have helped one in the past. Finally, there is also neutral karma, which derives from acts such as breathing, eating or sleeping. Neutral karma has no benefits or costs. Thai people believe about “the cycle of rebirth” also.

The cultural beliefs of Thai people are that only men are leaders, so it has instilled a belief or an idea that men have to drink alcohol; Men have to be polygamous or as a matter of “fate” for example, if a family has children with disabilities they are viewed as “deeds”⁵ or unfortunate to get children with disabilities and then are treated differently with disabled children.

Problem of the double standard⁶. The double standard makes a huge difference to Thai society such as; in criminals case the police take suspects or the accused for questioning or to get a confession then the people who were watching come to beat up the accused. Most people think that they have rights to do so because the accused or the suspects deserved to be punished by them. The criminal justice system is quite unsupportive for criminals. On the contrary, I think if the accused or the suspect were one of his family members, what will they do in this situation? And that’s why the author would like to explain the structure and the problem of law for controlling and monitoring human rights violations in Thailand.

5 C. Kosananan, *Ni-Ti-Prat-Ya*, Bangkok 2004, p. 388.

6 A double standard refers to the treatment of one class of entities differently than another class of entities, and implies unfair or unjustified differentiation. Double standards can be applied to many entities including people, groups, and concepts.

When judicial processes are applied more strictly to some people more than others, such double standards are seen as unjust because they violate a basic maxim of modern legal jurisprudence: that all parties should stand equal before the law. Double standards also violate the principle of justice known as impartiality, which is based on the assumption that the same standards should be applied to all people, without regard to subjective bias or favoritism based on social class, rank, ethnicity, gender or other distinction. A double standard violates this principle by holding different people accountable according to different standards.

There is a distinction to be made between double standards and hypocrisy, which implies the stated or presumed acceptance of a single standard a person claims to hold himself or herself accountable to, but which in practice may be disregarded. For example: a man who believes it is his right to have extramarital affairs, but that his wife does not have such a right holds a double standard. A man who publicly condemns extramarital affairs while maintaining his mistress is a hypocrite.

The Role of the Courts according to the Thai Constitution of 2007

The 2007 Constitution of the Kingdom of Thailand sets out the means to control and inspect State power, government authorities or government officials in order to protect the rights and freedoms of people from the abusive use of State power or the partial or total disregard of any person's, *inter alia*, human dignity, privacy, liberty and safety to life and property. The control measures by the Courts embedded in the 2007 Constitution of the Kingdom of Thailand consists of, will be shown below.

The Constitutional Court

The Constitutional Court consists of one president and fourteen judges appointed by the King upon the advice of the Senate. The Senate approves the list of the nominees selected from the following persons; Five Supreme Court Judges elected at the general meeting of the Supreme Court, two Supreme Administrative Court judges elected at the general meeting of the Supreme Administrative Court, five qualified persons in law and three qualified persons in political science. They elect one judge, among themselves, to be the President of the Constitutional Court. The President and Judges of the Constitutional Court shall be in office for only one term of nine years.

The functions of the Constitution Court affirmed by the Thai Constitution B.E. 2550 (2007) derive from four areas of its jurisdictions as following:

Firstly, the Jurisdiction in determining the constitutionality of the statutes and the organic law bills;

Secondly, the Jurisdiction in considering and deciding about the qualifications of a member of the house of representatives, a member of the senate, a cabinet minister, the Election commissioner and any person holding a political position who shall submit an account showing the particulars of his/her assets and liabilities;

Thirdly, the Jurisdiction in considering and deciding a dispute regarding the powers and duties of the organizations under the Constitution;

Fourthly, other jurisdictions as stipulated by the Constitution and the organic law.

The rationale behind the establishment of the Constitutional Court extends beyond the need for the adjudication of cases. It is specifically set up to oversee issues involving the State and/or the Constitution including issues relating to the protection of the rights and liberty of the people.

To establish a good standing in order to bring the case before the Constitutional Court, and as required by a provision under the Constitution, the question at issue must be one of constitutionality i.e. whether it violates or is against the Constitution. In any event, if such an issue, for example, a piece of law, is held as unconstitutional by the Co-

urt, that law will become void and unenforceable under Article 6 of the Constitution⁷. The conclusion or judgment rendered by the Court shall be strictly complied with as Article 216 of the Constitution clearly states that it is final and binding on all parties including Parliament, the Cabinet, the Courts and other governmental authorities.

Persons injured under the relevant provisions may submit a motion before the Constitutional Court to hear the case and decide whether the provisions of the law are contrary to or inconsistent with the Constitution provided that such persons have exhausted all means of remedies available under other organic laws as required by the Constitutional Court procedural law.

Moreover, there is another restriction that was invented to prevent the backlog of cases in the Constitutional Court and to screen only the important cases that necessarily require a hearing before the Constitutional Court e.g. a case that affects the feeling of the people nationwide or involves indispensable national interest. In other words, the injured parties are not allowed to file the case with the Constitutional Court directly⁸. Rather, they must submit the motion through either one of the two following authorities:

- (I) The National Human Rights Commission (NHRC) – Article 257 (2) of the Constitution sets out that if the case involves detrimental effects on human rights caused by any provision of any law and/or constitutionality, the injured person must submit a motion to the NHRC⁹.
- (II) The Office of the Ombudsman – Article 244 allows the injured person to submit a motion with the Office of the Ombudsman. Note well that the Ombudsman has exclusive discretion on deciding whether to accept or deny the motion¹⁰.

According to all of the above mentioned it seems that the Thai Constitutional Court concentrates on political disputes more than other cases. At the same time, in those cases when a human rights dispute had happened and the law also created the complicate

7 Article 6 stipulates that “the Constitution is the supreme law of State. The provisions of any law, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable.”

8 S. Vetmook, *Kan-Khum-Kong-Sit-Thi-Ma-Nut-Sa-Ya-Chon-Doi-Kan-Sa-Noe-Ruang-Tor-San-Rat-Tha-Tham-Ma-Noon-Khong-Kha-Na-Kam-Ma-Kan-Sit-Thi-Ma-Nut-Sa-Ya-Chon-Haeng-Chad-Tam-Mat-Tu-257(2)-Khong-Rat-Tu-Tham-Ma-Noon-Haeng-Rat-Cha-A-Na-Chak-Thai-Por-Sor-2550*, „Review of Asian Law” no 39, 2009, p. 402-411.

9 C. Sawengsak, *Kod-Mai-Ma-Ha-Chon : Kwam-Pen-Ma, Thit-Sa-Di, Lae-Lak-Kan-Ti-Som-Kan*, Bangkok 2010, p. 177.

10 M. Joompa, *Kod-Mai-Rat-Tha-Tham-Ma-Noon : Kham-Tham-lae-Kham-Top*, Bangkok 2010, p. 189.

procedure to file the case to the Constitutional Court according to the Article 257(2) and 244. Nowadays, the case about human rights violations in Thailand does not work with the Constitutional Court because Political influence still causes some problems of transparency for trial and adjudication in the case of human rights violations and weak institutional monitoring.

In practice, it has been said that the magnitude of cases deliberated by the Constitution Court alone is meaningless to the calculation of the amount of exposure of the Court to political interests. The overview of the issue is that the diversity or less of it in the cases handled by the Constitutional Court is dictated by the functions of the Court. If many of the functions are geared toward settling disputes with or stemming from political interests, it can serve as an indication that a great deal of the Constitutional Court's time and resources will be expended looking at political cases.

The Courts of Justice

The Courts of justice have power to try and adjudicate criminal, civil, bankruptcy, and all cases which are not within the jurisdiction of other types of court. When there is a problem of whether a particular case will fall under the jurisdiction of which type of courts, the commission on jurisdiction of courts chaired by the president of the Supreme Court is authorized by the Constitution to make a decision. The Court of Justice has three levels as follows: The Supreme Court, The Court of Appeal and The Court of First Instance.

All cases commence at the Court of First Instance. The appeal of the judgment of the Court of First Instance is filed to the Court of Appeal with some restrictions. The Supreme Court is the highest court which has jurisdiction over the cases appealed from the Court of Appeal subject to the restriction provided by Civil and Criminal Procedure Codes. There is a requirement under the constitution that the hearing of a case should have a full quorum of judges. Any judge who is not sitting at the hearing of a case shall not give judgment or a decision for such a case, except for the case of force majeure or any other unavoidable necessity¹¹.

The Courts of Justice has general jurisdiction over all cases. Therefore, as required by Article 218 of the 2007 Constitution of the Kingdom of Thailand, the Courts of Justice has the power and jurisdiction to try and adjudicate all cases unless the Constitution specifically requires that it must be under the jurisdiction of any other Court.

Generally, the Courts of Justice will render judgments on the issue of whether an arrest or detention of a person is illegal or against the Constitution. Even a suspect cannot be deprived of his or her privacy and liberty unless a warrant is duly issued by the responsible Court on a reasonable and probable cause under the virtue of the law (Ar-

11 V. Muntarbhom, *Human rights and human development: Thailand country study*, "Human Development Occasional Papers" no. 1, 2000, p. 1-28.

ticle 32). A warrantless search or arrest or entering the dwelling of a person without the consent of the owner of the premise must also be justified by the Constitution, although these can be seen in rare circumstances e.g. hot pursuit, exigent evidence or plain view, etc (Article 33).

According to all of the above mentioned the Constitution has purposed to protect the rights and liberties of people. Especially, the rights in a criminal case which provided that the accused shall have the rights to a speedy trial, correctly and with fairness. The delay of justice is one of the causes that effects the rights of people according to the Constitution and commits an act of damage for the parties who were arrested or a lack of liberty. The Court of Justice is one organization that is ineffective for the protection of human rights violations because the Court does not manage the cases that are overloaded at this time and do an unreal speedy trail. The Court has to remind that justice delayed is justice denied. People hope that the Courts speedily and correctly run the trail and adjudication within a suitable time limit. The Court does not avoid the main role in the trail and adjudication proceedings. It might be said that the Court needs to manage the cases in the Court and train the judicial profession and law enforcers on human rights.

The Administrative Courts

The Administrative Court has an exclusive jurisdiction over the administrative disputes between the private sector and the State organs concerning the issue of the abuse of power by such a State organ. Accordingly, the Act for the establishment of and procedure for Administrative Court B.E. 2542 (1999) gives the Administrative Court the jurisdiction over the cases as follows: 1) case of a dispute between a private sector or individual and the State agency, State enterprise, local government organization, or State office under the superintendence or supervision of the government 2) case of dispute between the State agency, State enterprise, local government organization, or State official under the superintendence or supervision of the government.

Both of the cases mentioned above are concerned with issues of dispute as a consequence of the act or omission of the act that must be performed by such an agency, State enterprise, local government organization or State official; or the dispute as a consequence of the act or omission of the act of such a State agency, State enterprise, local government organization, or State official which under the responsibility of the said State agency, State enterprise, local government organization, or State official in performing duties under the law¹².

According to the Act for the establishment of and the procedure for Administrative Court B.E. 2542 (1999), the Administrative Court shall have two levels as follows: 1) the Supreme Administrative 2) the Administrative Court of First Instance.

12 The Central Intellectual Property and International Trade Court, *The Judicial System in Thailand: An Outlook for a New Century*, "IDE Asian Law Series" no. 6, 2001, p. 1-166.

One of the most important rationales behind the establishment of the Administrative Courts is human rights protection. This is so that the Administrative Courts can decide whether a particular public or national interest should outweigh or supercede an individual protection of human rights. The type of cases brought before the Administrative Courts often result in the revocation of an illegal or unconstitutional administrative act or order and usually accompany with the payment of compensation to the injured party¹³.

The Role of the Administrative Courts according to Article 223 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) separately states the competence and the adjudication matters under the jurisdiction of the Administrative Courts whilst the Courts of Justice, defined by Article 218 has the power to try and adjudicate all cases except those specified by the Constitution or the law to be within the jurisdiction of the other Courts. The linkage between the Constitutional Court, the Administrative Courts or the Courts of Justice and the National Human Rights Commission is prescribed by Article 257 paragraph one (2) (3) and (4) of the Constitution that the National Human Rights Commission has the powers and duties to bring the case to the Constitutional Court, the Administrative Courts or the Courts of Justice for the injured person at the request of the victim.

The case study is focused on Article 23 paragraph two of the Internal Security Act B.E. 2551 (2008) stating “Any court case arising from a regulation, notification, order or action under this provision shall fall within the power of the Courts of Justice” and Article 16 of the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005) stating “A regulation, notification, order or an act under this Emergency Decree shall not be subject to the law on administrative procedures and the law on the establishment of Administrative Court and Administrative Court Procedure.” Both acts were enacted for public administration in an emergency situation and involve the powers and duties of the National Human Rights Commission regarding the submission of cases for court adjudication as provided by Article 257 paragraph one (2) (3) and (4).

The problem arose when the complainant files a petition to the National Human Rights Commission that any law, order or administrative act is detrimental to the human rights of the complainant and begs the question of constitutionality. The case is to be submitted before the Administrative Courts under Article 257 paragraph one (3) of the Constitution and under clause 10, 11 and 12 of the National Human Rights Commission Regulation regarding the principles and practice of case submission before the Constitutional Court or the Administrative Courts, whilst the provisions of the aforesaid Act or Decree recall the case has to be lodged before the Courts of Justice and that the case

13 *Ibidem*.

shall not be subject to the law on the establishment of Administrative Court and Administrative Court Procedure. However, according to the provisions of the Constitution, the National Human Rights Commission has to submit the case to the Administrative Courts who independently take the case within their jurisdictions.

In the event that an injured victim submits a complaint to the Administrative Courts because any law, rule or administrative act is detrimental to the human rights of the complainant and parties, the same problem arises. This type of case is often submitted to the Administrative Courts. This action might be argued by state agencies or state officials who are defendants that the above-mentioned cases are not under the jurisdiction of the Administrative Courts because the provisions of the aforesaid Act or Decree recall that the case is subject to the adjudication of the Courts of Justice, or is not subject to the law on the establishment of Administrative Courts and Administrative Court procedure. These problems reflect the linkage between the national security and the management system of human rights protection tools; the enactment of the law stating the court jurisdiction relevant to the human rights. The issue here is to consider whether the relation is drawn up in accordance with the court jurisdiction system as provided by the Constitution.

Conclusion

Regardless of the obvious fact that the Constitution of the Kingdom of Thailand B.E. 2550 (2007) clearly honors and undertakes to protect human rights and ensure that such rights and freedoms of citizens are not violated against, only a small minority has access to such information or truly understand what it means or how it involves them. However, In respect of all of the above mentioned the role of the Constitutional Court should have development paradigms about human rights cases and reduce the complicated proceedings to receive the human rights case and need to promote transparency and counter political intervention in the Constitutional Court. The Court of Justice needs to manage the case for trial and adjudication in the Court. The Court of Justice needs to be improved, and the trial system should be speeded up because "Justice delayed is Justice denied" and train the judicial profession for human rights protection according to international standards.

Finally, The Administrative Courts are regarded as a state mechanism that protects citizen rights as provided by law by promoting the right to development and other rights concerned. The court has the duty to protect all rights linked with the right to development guaranteed by the constitutions and laws by stressing the importance for a quick adjudication occurred in time to prevent the damage that might be caused, by establishing appropriate executive measures to ensure a remedy to the damage to an individual allegedly violated of rights and to promote the right to development, the Admini-

strative Court performs in accordance with the principles of its vision stating that the Administrative Court will exercise its judicial power to provide justice to administrative disputes with the aim of balancing the protection of citizens rights and the states performance for public interests, so that the development is carried out in the favor of all human rights, equally and can be beneficial for the nation.

This is the reason; the author decides to justify the article, with the clear vision so that more Thai nationals can become aware of their own rights. They should be aware of the fact that they are all equal and are entitled to the same protection and law. No matter who they are and where they come from. Additionally, if the attempt to increase the awareness in Thailand becomes successful, and the public is well-informed about their rights it will be a great help in participating in the check and balance system which oversees the work of the government and other government authorities, creates transparency and accountability, and prevents corruption to a certain extent. In this respect the government and their sub-bodies should keep in mind that it is the duty of the State to preserve and protect human rights to create transparency, accountability and human rights protection in compliance with the Universal Declaration of Human Rights under the framework of the United Nations.

SUMMARY

Human rights and the role of courts in Thailand

The purpose of the article is to analyse the subject of the problems involved in protecting human rights in Thailand and the role of the courts according to the Thai Constitution. The author discusses four selected issues of human rights protection in Thailand: the citizens' insufficient awareness of human rights, the ineffectiveness of law enforcement, the possible conflicts linked to traditional beliefs and the problems of applying double standards. The article also presents the structure and the function of the Constitutional Court, the Court of Justice and the Administrative Court of Thailand. Throughout the paper the author seeks to prove that the Constitution of the Kingdom of Thailand honours and protects human rights.

KEYWORDS: human rights, checks and balances, Courts of Thailand, Thai Constitution